



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 20, 1998

Mr. Ryan Tredway
Staff Attorney
Legal and Compliance Division, MC 110-1A
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR98-0503

Dear Mr. Tredway:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 112712.

The Texas Department of Insurance (the "department") received a request for "[a] copy of the Reden & Anders report on Kaiser-Permanente submitted to the Texas Department of Insurance on Monday, Nov. 10, 1997." You have informed this office that the department's position is that the requested report is a public record that is subject to disclosure. You raise no exception to public disclosure on behalf of the department. However, because the interests of Kaiser Foundation Health Plan of Texas, Inc. ("Kaiser") are implicated, you raise section 552.305 of the Government Code.

Pursuant to section 552.305 of the Government Code, this office informed Kaiser of the request and of its obligation to claim the exceptions to disclosure it believes apply to the requested information, together with its arguments as to why it believes the claimed exceptions apply.

First, Kaiser argues that section 9 of article 1.15 of the Insurance Code makes the report confidential. Section 9 states:

A final or preliminary examination report, and any information obtained during the course of an examination, is confidential and is not subject to disclosure under the open records law . . . and its subsequent amendments.

Ins. Code art. 1.15, § 9. The department asserts that the requested report is neither an examination report nor is it information obtained during the course of an examination. After a review of the report, we conclude that the report at issue is not an examination report

contemplated by section 9 of article 1.15, nor is it information obtained during the course of an examination. Kaiser submitted the report to the department pursuant to an April 18, 1997 consent order which required Kaiser to obtain the services of a consultant to address some of the deficiencies identified in the consent order. Thus, the report is not deemed confidential under section 9 of article 1.15 of the Insurance Code.

Second, Kaiser argues that the report is made confidential by article 20A.17(b)(4) of the Insurance Code which states:

The Commissioner may examine and use the records of a health maintenance organization, including records of a quality of care assurance program and records of a medical peer review committee . . . as necessary to carry out the purposes of this Act, including an enforcement action under Section 20 of this Act. That information is confidential and privileged and is not subject to the open records law, Chapter 552, Government Code, or to subpoena except as necessary for the commissioner to enforce this Act.

Ins. Code art. 20A.17(b)(4). Additionally, article 20A.27 states:

All applications, filings, and reports required under this Act shall be treated as public documents, except that examination reports shall be considered confidential documents which may be released if, in the opinion of the commissioner, it is in the public interest.

Ins. Code art. 20A.27. The department contends that article 20A.17(b)(4) is inapplicable to the requested report. Having reviewed the arguments, statutes, and the requested report, we determine that the report at issue is not a record of a health maintenance organization that is used for the purposes of article 20A.17(b)(4). Therefore, the report is not confidential under article 20A.17(b)(4).

Third, Kaiser asserts that section 552.110 of the Government Code excepts the report from public disclosure. Section 552.110 protects the property interests of private parties by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.

The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, which holds a "trade secret" to be:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information

in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business. . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); see *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), cert. denied, 358 U.S. 898 (1958). If a governmental body takes no position with regard to the application of the “trade secrets” branch of section 552.110 to requested information, we accept a private person’s claim for exception as valid under that branch if that person establishes a prima facie case for exception and no one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5.¹

In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts’ interpretation of exemption 4 to the federal Freedom of Information Act when applying the second prong of section 552.110 for commercial and financial information. In *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the Government’s ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). A business enterprise cannot succeed in a *National Parks* claim by a mere conclusory assertion of a possibility of commercial harm. Open Records Decision No. 639 (1996) at 4. To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure. *Id.*

After reviewing Kaiser’s arguments and the information it seeks to withhold, we conclude that the report is not information excepted from public disclosure under section 552.110.

¹The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: “(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and other involved in [the company’s] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.” RESTATEMENT OF TORTS, § 757 cmt. b (1939); see also Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

Next, Kaiser contends that the requested report and the underlying documents² contain medical records and peer review information that is confidential under the Medical Practice Act (the “MPA”), article 4495b of Vernon’s Texas Civil Statutes, and section 161.032 of the Health and Safety Code, respectively. We conclude that the requested report is neither a “medical record” as defined in the MPA nor does it contain peer review information pursuant to section 161.032. Section 5.08(b) of the MPA protects from disclosure “[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician.” V.T.C.S. art. 4495b, § 5.08(b); Open Records Decision No. 598 (1991).

Section 161.032 of the Health and Safety Code makes confidential the “records and proceedings of a medical committee.” Under section 161.031(a) of the Health and Safety Code, a “medical committee” includes any committee of a hospital, medical organization, or extended care facility. It includes an ad hoc committee appointed to conduct a specific investigation as well as a committee established under the bylaws or rules of the organization. Health & Safety Code § 161.031(b). While the records and proceedings of a medical committee are confidential, *id.* § 161.032(a), the confidentiality does not extend to “records made or maintained in the regular course of business by a hospital.” *Id.* § 161.032(c); Open Records Decision No. 591 (1991). Documents generated by a committee in order to conduct open and thorough review, as well as documents prepared by or at the direction of the committee for committee purposes, are confidential.

We find that the requested report does not come within the protection of either section 161.032 of the Health and Safety Code or the MPA. Open Records Decision No. 487 (1988) at 2-5.

Finally, Kaiser contends that the information is protected by privacy rights. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Section 552.101 encompasses both common-law and constitutional privacy. Common-law privacy excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Therefore, information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 (1992) at 1.

The constitutional right to privacy protects two interests. Open Records Decision No. 600 (1992) at 4 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)). The first is the interest in independence in making certain important decisions related to the “zones of privacy” recognized by the United States

²We note that the request is for the report only and not the underlying documents reviewed by Reden & Anders.

Supreme Court. Open Records Decision No. 600 (1992) at 4. The zones of privacy recognized by the United States Supreme Court are matters pertaining to marriage, procreation, contraception, family relationships, and child rearing and education. *See id.*

The second interest is the interest in avoiding disclosure of personal matters. The test for whether information may be publicly disclosed without violating constitutional privacy rights involves a balancing of the individual's privacy interests against the public's need to know information of public concern. *See* Open Records Decision No. 455 (1987) at 5-7 (citing *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981)). The scope of information considered private under the constitutional doctrine is far narrower than that under the common law; the material must concern the "most intimate aspects of human affairs." *See* Open Records Decision No. 455 (1987) at 5 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490, 492 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)). After reviewing the submitted report, we find that the report does not contain any information that is protected by a right of privacy. The requested report must, therefore, be released.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL\rho

Ref: ID# 112712

Enclosure: Submitted document

cc: Mr. Charles Ornstein
The Dallas Morning News
P.O. Box 655237
Dallas, Texas 75265
(w/o enclosure)

Mr. J.A. (Tony) Patterson, Jr.
Fulbright & Jaworski L.L.P.
2200 Ross Avenue, Suite 2800
Dallas, Texas 75201
(w/o enclosure)